

Where the claimant quit because she did not like that the owner called her disrespectful for smoking in the front of the restaurant, she did so for disqualifying reasons, pursuant to G.L. c. 151A, § 25(e)(1). However, since the separation occurred in the four weeks prior to the filing of her claim and was from subsidiary part-time work, the claimant is subject to a constructive deduction.

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BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by Matthew Shortelle, a review examiner of the Department of Unemployment Assistance (DUA), to deny unemployment benefits. We review, pursuant to our authority under G.L. c. 151A, § 41. We affirm the conclusion that the claimant's separation from the employer was disqualifying; however, we also conclude that a constructive deduction, rather than a full disqualification, is applicable.

The claimant resigned from her position with the employer on December 1, 2016. She filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on February 11, 2017. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by both parties, the review examiner overturned the agency's initial determination and denied benefits in a decision rendered on March 23, 2017.

Benefits were denied after the review examiner determined that the claimant voluntarily left employment without good cause attributable to the employer and, thus, was disqualified, under G.L. c. 151A, § 25(e)(1). After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal, we remanded the case to the review examiner to take additional evidence, mostly as to whether a constructive deduction, pursuant to 430 CMR 4.71–4.78, should apply to the claimant's unemployment claim. Both parties attended the remand hearing. Thereafter, the review examiner issued his consolidated findings of fact. Our decision is based upon our review of the entire record.

The issues before the Board are: (1) whether the review examiner's conclusion that the claimant is subject to disqualification, pursuant to G.L. c. 151A, § 25(e)(1), is supported by substantial and credible evidence and is free from error of law, where the review examiner found that the claimant quit after being reprimanded by the employer for smoking near the entrance of the employer's restaurant, and, (2) if the separation is disqualifying, whether the review examiner's

conclusion that the claimant is subject to a total disqualification is free from error of law, based on the claimant's employment history.

Findings of Fact

The review examiner's consolidated findings of fact and credibility assessments are set forth below in their entirety:

1. The claimant's usual and normal occupation is chef.
2. From November 1, 2015 through December 31, 2015, the claimant worked for an unrelated restaurant.
3. From October 1, 2015 until December 31, 2015, the unrelated restaurant employer paid the claimant \$592.80.
4. The claimant worked as a prep cook for the employer, a restaurant, from May 27, 2016 until December 1, 2016, earning \$16.00 per hour.
5. The claimant worked as a full time prep chef for a second unrelated employer restaurant (the Restaurant) from May 21, 2015, until October 15, 2016, earning \$15.00 per hour.
6. While working for the Restaurant, the claimant worked thirty (30) to thirty-five (35) hours per week and earned \$14 per hour from approximately May, 2015 until July, 2015, then \$15.00 per hour from approximately July, 2015, until October, 2016.
7. While working for the Restaurant and the employer, the claimant worked as a per diem prep cook for a second unrelated employer hospital (the Hospital) from March 15, 2016, until December 14, 2016.
8. The claimant completed training and worked as needed for the Hospital earning \$22.96 per hour.
9. The employer hired the claimant to work approximately eighteen (18) hours per week.
10. Beginning in approximately the fall of 2016, the claimant began to work between twenty (20) and twenty-five (25) hours per week for the employer.
11. The employer's Owner (the Owner) supervised the claimant.
12. The employer expects employees to smoke at the rear of the employer's restaurant (the Restaurant) by the garbage and to not smoke at the front or entrance of the Restaurant. The expectation ensures the Restaurant remains a smoke-free environment.

13. The claimant was aware of the expectation based on her work experience.
14. During the claimant's employment, the claimant smoked at the back of the Restaurant by the garbage and placed cigarette butts in her back left pocket.
15. On October 15, 2016, the Restaurant laid the claimant off.
16. From July 1, 2016 through October 31, 2016, the claimant worked for the employer thirteen weeks.
17. On November 29, 2016, the claimant smoked a cigarette at the front of the Restaurant after the Restaurant had closed as a result of rain while she waited for a taxi cab.
18. On November 29, 2016, the claimant left cigarette butts at the Restaurant's entrance.
19. On November 30, 2016, the Owner found cigarette butts at the entrance of the Restaurant.
20. The Owner texted the claimant to "please never" smoke at the entrance to the Restaurant again, the Restaurant was a non-smoking facility, and leaving cigarette butts at the entrance to the Restaurant was disrespectful.
21. The Owner texted the claimant she could take the night off on November 30, 2016 and return to work.
22. The claimant believed the Owner calling her disrespectful was "appalling."
23. On December 1, 2016, the claimant arrived for work and spoke with the Owner.
24. The claimant told the Owner she had a problem with him calling her disrespectful. The Owner told the claimant he was sorry she was offended, he believed she behaved disrespectfully, and he hoped she would continue working.
25. The claimant told the Owner she could not work for someone who believed she was disrespectful.
26. The Owner told the claimant he understood and she could leave if she chose to.
27. On December 1, 2016, the claimant quit her employment because the Owner told her smoking at the entrance to the Restaurant and leaving cigarette butts

at the entrance to the Restaurant was disrespectful and she believed the Owner would blame her for any issues in the workplace as a result of that disrespect.

28. On December 14, 2016, the claimant filed a claim for unemployment benefits with an effective date of December 11, 2016.
29. The Department of Unemployment Assistance determined that the claimant was monetarily eligible to receive weekly unemployment benefits in the amount of \$313.00, with an earnings disregard of \$104.33.
30. On December 14, 2016, the Hospital discharged the claimant because she had not worked for the employer in six months.
31. From October 1, 2015 until December 31, 2015, the Restaurant paid the claimant wages totaling \$3,385.62.
32. From January 1, 2016 until March 31, 2016, the Hospital paid the claimant wages totaling \$415.36.
33. The claimant did not receive any wages from the Restaurant from January 1, 2016 through March 31, 2016.
34. From April 1, 2016 through June 30, 2016, the Hospital paid the claimant wages totaling \$1,110.93, the Restaurant paid the claimant wages totaling \$3,346.28, and the employer paid the claimant wages totaling \$722.08.
35. From July 1, 2016 through September 30, 2016, the Restaurant paid the claimant wages totaling \$7,787.05, the employer paid the claimant wages totaling \$3,226.83.
36. The Hospital did not pay the claimant any wages after June 30, 2016.
37. It is unknown how many weeks the claimant worked for the Hospital.

Credibility Assessment

During the remand hearing, the claimant testified she did not work for the Hospital after April, 2016, she completed training for the Hospital in [March], 2016, and she then worked approximately two shifts of approximately eight (8) hours each, earning \$29.96 per hour. However, the claimant admitted the total wages paid to her by the Hospital were accurate. The claimant also testified the Hospital discharged her in December, 2016 after she failed to work for them in the preceding six months. As a result, it cannot reasonably be concluded the employer paid the claimant wages totaling \$1,110.93 for two shifts in April, 2016 nor that the Hospital discharged her in December, 2016 after approximately eight months of not working for the employer and then citing her lack of work in the preceding six months as the reason for her

discharge. As a result, there can be no conclusions reached regarding the claimant's specific hours or shifts while working for the Hospital.

The claimant testified she did not work for the Restaurant seasonally.

Ruling of the Board

In accordance with our statutory obligation, we review the decision made by the review examiner to determine: (1) whether the consolidated findings are supported by substantial and credible evidence; and (2) whether the review examiner's ultimate conclusion is free from error of law. Upon such review, the Board adopts the review examiner's consolidated findings of fact and deems them to be supported by substantial and credible evidence, except for the October 31, 2016, date noted in Consolidated Finding of Fact # 16. Based on the Board's questions, and the other findings of fact, it appears as if the review examiner was making a finding as to how many weeks the claimant worked in the third quarter of 2016. That quarter ended on September 30, 2016, not October 31, 2016.¹ As discussed more fully below, we affirm the review examiner's legal conclusion that the claimant's separation from the employer is disqualifying. However, we disagree with his conclusion that the claimant is completely disqualified from receiving benefits following her separation from this employer.

The parties generally agreed that the claimant caused her own separation by resigning on December 1, 2016. G.L. c. 151A, § 25(e)(1), provides, in pertinent part, as follows:

[No waiting period shall be allowed and no benefits shall be paid to an individual under this chapter] . . . (e) For the period of unemployment next ensuing . . . after the individual has left work (1) voluntarily unless the employee establishes by substantial and credible evidence that he had good cause for leaving attributable to the employing unit or its agent

Under this section of law, the claimant has the burden to show that she is eligible to receive unemployment benefits. The review examiner concluded that the claimant had not carried her burden to show that she separated for good cause attributable to the employer, and we agree.

The claimant's separation occurred after the owner of the employer's restaurant found cigarette butts at the entrance to the restaurant on November 30, 2016. The butts were from cigarettes smoked by the claimant on November 29. Generally, the claimant was aware that she was not to smoke at the front entrance to the restaurant, *see* Consolidated Findings of Fact ## 12 and 13, and she usually smoked in the rear of the restaurant by the trash receptacle. She had a habit of placing the cigarette butts in her back pocket after she was finished smoking. Consolidated Finding of Fact # 14. Nevertheless, she smoked at the front entrance on November 29, and the owner found cigarette butts on the ground in that area. Following his discovery, the owner contacted the claimant and told her not to smoke at the entrance to the restaurant. The claimant felt that the owner's response was inappropriate and "appalling." Specifically, the claimant was

¹ The review examiner correctly noted the dates of the third quarter of 2016 in Consolidated Finding of Fact # 35.

very upset that the owner had called her actions disrespectful. She quit, feeling that she could not work for someone who felt that she had been disrespectful.

Under the circumstances described above and in the findings, we agree with the review examiner that the claimant did not carry her burden to show that she left her job for good cause attributable to the employer. As noted, the claimant was generally aware that she should not smoke at the front of the restaurant. She did so anyway, and left cigarette butts there. It was reasonable for the employer to speak to her about her behavior. The owner's description of the behavior as "disrespectful" is not so egregious, unsavory, or inappropriate as to create good cause for the claimant to resign. Nothing in the findings suggests that the owner was personally rude to the claimant, that he swore or denigrated her, or that he acted unprofessionally toward her on November 30. The claimant did not have a reasonable workplace complaint against the employer. Thus, she has not shown she had good cause to quit, and she is subject to disqualification, under G.L. c. 151A, § 25(e)(1).

Having concluded that the review examiner was correct to determine that the separation was disqualifying, we now move on to the main issue addressed by our remand order. In the original decision, the review examiner concluded the claimant would be subject to a full disqualification from the receipt of benefits, beginning November 27, 2016. However, the findings of fact indicate that the claimant's job with the employer was part-time. In addition, she had other employment, where she worked more hours and for more pay. This suggests that the claimant may be subject to a constructive deduction, pursuant to the provisions of 430 CMR 4.71–4.78.

A constructive deduction will be imposed if a disqualifying separation from subsidiary part-time work occurs during the base period after a prior, non-disqualifying separation from primary employment. 430 CMR 4.76 provides, in relevant part, as follows:

(1) A constructive deduction, as calculated under 430 CMR 4.78, from the otherwise payable weekly benefit amount, rather than complete disqualification from receiving unemployment insurance benefits, will be imposed on a claimant who separates from part-time work for any disqualifying reason under M.G.L. c. 151A, § 25(e), in any of the following circumstances:

(b) if, after the separation from subsidiary, part-time work, the claimant applies for and obtains unemployment insurance benefits on account of a non-disqualifying separation from primary or principal work that preceded the separation from part-time work.

In this case, the claimant filed her claim on December 14, 2016, and the claim is effective December 11, 2016. During her base period,² the claimant worked for the instant employer just prior to filing her claim. However, she had worked full-time as a prep cook for a different restaurant until October 15, 2016. Since the claimant began work with this employer on a part-time basis in May of 2016, she worked the two jobs simultaneously for several months.

² The "base period" is, generally speaking, the four completed quarters prior to the effective date of the unemployment claim.

Moreover, because the work with the other employer was full-time, and the claimant earned more from that employer, the claimant's part-time employment with the employer in this case was subsidiary to the other, full-time work. In addition, the other restaurant laid the claimant off in October, 2016, and such a separation is non-disqualifying, under G.L. c. 151A, § 25(e)(2). Given these circumstances, the constructive deduction regulation noted above applies, and the claimant should not be subject to a full disqualification from the receipt of benefits.

A constructive deduction is defined as "the amount of remuneration that would have been deducted from the claimant's weekly benefit amount . . . if the claimant had continued to be employed on a part-time basis." 430 CMR 4.73. The amount of the constructive deduction each week is determined by the claimant's earnings from the part-time employer. 430 CMR 4.78(1)(a) provides as follows:

If the claimant's separation from part-time subsidiary work occurred in the last four weeks of employment prior to filing of the unemployment claim; the average part-time earnings will be computed dividing the gross wages paid by the subsidiary employer in the last completed quarter by 13. If there are less than 13 weeks of work, then the gross earnings shall be divided by the actual number of weeks worked.

In this case, the last completed quarter prior to the filing of the claimant's unemployment claim was the third quarter of 2016. In that quarter, she was paid a total of \$3,226.83. *See* Consolidated Finding of Fact # 35. The review examiner also noted that the claimant worked for 13 weeks in that quarter. *See* Consolidated Finding of Fact # 16. Therefore, the claimant's average weekly earnings were \$248.00 (\$3,226.83 divided by 13 weeks), and this is the amount of the constructive deduction to be applied to the claimant's claim.³

We, therefore, conclude as a matter of law that the review examiner's conclusion that the claimant quit her job under disqualifying circumstances is free from error of law. However, the conclusion that the claimant should be subject to a total disqualification was an error of law, and we reverse that conclusion. The claimant should be subject to a constructive deduction.

³ We note that the benefit rate on the claimant's claim was determined to be \$313.00, with an earnings exclusion of \$104.33. Assuming the claimant has no other earnings, she would be eligible for some benefits following her separation from the employer.

The review examiner's decision is affirmed as to the separation issue, under G.L. c. 151A, § 25(e)(1). However, we reverse the total disqualification from benefits. Beginning the week of November 27, 2016, the claimant shall be subject to a constructive deduction in the amount of \$248.00 each week, until she meets the re-qualifying provisions of the law.⁴

BOSTON, MASSACHUSETTS
DATE OF DECISION - July 26, 2017



Paul T. Fitzgerald, Esq.
Chairman



Charlene A. Stawicki, Esq.
Member

Member Judith M. Neumann, Esq. did not participate in this decision.

**ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS STATE DISTRICT
COURT OR TO THE BOSTON MUNICIPAL COURT
(See Section 42, Chapter 151A, General Laws Enclosed)**

The last day to appeal this decision to a Massachusetts District Court is thirty days from the mail date on the first page of this decision. If that thirtieth day falls on a Saturday, Sunday, or legal holiday, the last day to appeal this decision is the business day next following the thirtieth day.

To locate the nearest Massachusetts District Court, see:
www.mass.gov/courts/court-info/courthouses

Please be advised that fees for services rendered by an attorney or agent to a claimant in connection with an appeal to the Board of Review are not payable unless submitted to the Board of Review for approval, under G.L. c. 151A, § 37.

SF/rh

⁴ See CMR 4.76(2) and (3).